

APPEAL NO. 051505
FILED AUGUST 22, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 25, 2005. The hearing officer determined that respondent 2 (claimant) was entitled to supplemental income benefits (SIBs) for the first quarter.

The appellant (carrier) appeals Texas Workers' Compensation Commission (Commission) Order for Attorney's Fees dated June 15, 2005 (Order No. 1, Sequence No. 13), and Commission Order for Attorney's Fees dated June 30, 2005 (Order No. 2, Sequence No. 14), based on the reasonableness and necessity of attorney's fees in the respective orders for respondent 1 (claimant's attorney) to be paid pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 152.1(f) (Rule 152.1(f)). The claimant's attorney responds and "appeals" Order No. 2, Sequence No. 14 on the grounds that the hearing officer approved the fee "based on a \$150 hourly rate, instead of \$200 hourly rate," and failed to include an entry for work done on March 24, 2005. The claimant's attorney also contends that Order No. 1, Sequence No. 13 was not properly before the Appeals Panel because it had been approved by a Benefit Review Officer (BRO) rather than a Hearing Officer. The claimant's attorney otherwise explains what appears to be double billing for services.

DECISION

Reversed and remanded.

Rule 152.3(d) provides that except as provided in subsection (e) of Rule 152.3, an attorney, claimant, or carrier who contests the fee fixed and approved by the Commission shall request a benefit CCH 15 days after receipt of the Commission's order. Rule 152.3(e) provides that an attorney, claimant, or carrier who contests the fee ordered by a hearing officer after a CCH shall request review by the Appeals Panel pursuant to the provisions of Rule 143.3 (relating to requesting the Appeals Panel review the decision of the hearing officer). Order No. 1, Sequence No. 13 dated June 15, 2005, was approved by the BRO therefore the proper procedure to contest the fee fixed in Order No. 1, Sequence No. 13 was to request a benefit CCH. We note that in Dispute Resolution Information System (DRIS) note No. 187 of 195 that on July 8, 2005, the Commission "REC'D CARRIER'S REQUEST FOR A ATTY FEE CCH ON REASONABLE AND NECESSARY FEES" and in DRIS note No. 190 of 195 the carrier was advised that the "CCH REQ ON SEQ 13 FOR \$3075.00" was not timely disputed and concluded that there was no need for a CCH at that time. The appeal regarding the reasonableness and necessity of Order No. 1, Sequence No. 13 is not properly before us and will not be considered.

The claimant's attorney, in her response "appeals" Order No. 2, Sequence No. 14, asking for award of \$200 an hour instead of the awarded \$150 an hour and asks for

the inclusion of 2.5 hours to prepare for a CCH which is alleged to have not been included in Order No. 2, Sequence No. 14. The claimant's attorney's response is timely as a response but is not timely as an appeal. Section 410.202(a) provides that to appeal the decision of a hearing officer, a party shall file a written request for appeal with the Appeals Panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same date serve a copy of the request for appeal on the other party. Section 410.202 was amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code from the computation of time in which to file an appeal or a response. Rule 102.5(d) provides in pertinent part that for purposes of determining the date of receipt for those written communications sent by the Commission which require the recipient to perform an action by a specific date after receipt, unless the great weight of the evidence indicates otherwise, the Commission shall deem the received date to be five days after the date mailed. Order No. 2, Sequence No. 14 is dated June 30, 2005. Pursuant to Rule 102.5(d) Order No. 2, Sequence No. 14 is deemed to have been received by the claimant's attorney on Tuesday, July 5, 2005, unless the great weight of evidence indicates otherwise. With the deemed date of receipt of July 5, 2005, the claimant's attorney's "appeal" needed to be filed or mailed no later than Tuesday, July 26, 2005. The response ("appeal") was filed by facsimile transmission on July 29, 2005, and therefore while timely as a response is untimely as an appeal.

Order No. 2, Sequence No. 14 lists items with dates of service from February 7 through March 29, 2005. The CCH at issue for the first quarter of SIBs was held on March 25, 2005. Order No. 2, Sequence No. 14 includes various items prior to March 25, 2005, and includes attending the proceeding, legal research and travel time on March 25, 2005. Order No. 2, Sequence No. 14 also includes an entry of "Review File" by both the claimant's attorney and a second attorney on March 29, 2005, four days after the CCH. Order No. 1, Sequence No. 13 includes \$3,075.00 of fees awarded for services performed March 30 through May 31, 2005, which the carrier suggests was for attorney's fees for the second quarter of SIBs which was resolved by a Benefit Dispute Agreement (TWCC-24) signed by the carrier's representative on May 5, 2005. (The copy attached to the appeal is not signed by a Commission representative.) We are unable to determine whether the two entries for "Review File" performed on March 29, 2005, related to the first quarter of SIBs resolved at the March 25, 2005, CCH or dealt with the TWCC-24 agreement.

We do note that the attorney's fees requested for dates of service from February 7 through March 29, 2005, contained in a Commission Order for Attorney's Fees dated May 9, 2005 (Order No. 3, Sequence No. 12), are distinctly similar to the requested attorney's fees in Order No. 2, Sequence No. 14. We note that most (\$3,562.50 out of \$4,062.50) of the attorney's fees requested in Order No. 3, Sequence No. 12 were disapproved for "Multiple Reasons." The claimant's attorney in the response explains that Order No. 3, Sequence No. 12 ordering the carrier to pay \$500 out of the requested \$4,062.50 "was rescinded and a new order (Sequence No. 14) [Order No. 2] was issued."

Rule 152.1(f) provides as follows:

An attorney for an employee who prevails when a carrier contests a Commission determination of eligibility for [SIBs] shall be eligible to receive a reasonable and necessary attorney's fee, including expenses. This fee is payable by the carrier, not out of the employee's benefits and the fee shall not be limited to a maximum of 25% of the employee's recovery. All provisions of these rules, except § 152.4, of this title (relating to Guidelines for Legal Services Provided to Claimant's and Carriers), apply.

In the file forwarded for review is a Commission Order for Attorney's Fees dated February 15, 2005 (Order No. 4, Sequence No. 7), for dates of service of January 24 and January 25, 2005, for work done for the Benefit Review Conference for the first quarter of SIBs which were (incorrectly) ordered to be paid out of the claimant's income benefits. DRIS note 185 of 195 indicates Order No. 4, Sequence No. 7 incorrectly withheld attorney's fees from the claimant's benefits and "THE CARRIER HAS SINCE REIMBURSED THE CLMT THOSE ATTY FEES." The claimant's attorney similarly contends that Order No. 2, Sequence No. 14 was a new order to replace Order No. 3, Sequence No. 12 which had been rescinded. Neither the file before us nor the DRIS notes indicate that Order No. 3, Sequence No. 12 was rescinded and that Order No. 2, Sequence No. 14 was the order which replaced Order No. 3, Sequence No. 12.

We remand the case to the hearing officer for a hearing on remand to allow the parties to show which of the Commission Orders for Attorney's Fees, if any, had been rescinded and which Orders had replaced any rescinded orders. Order No. 1, Sequence No. 13 has not been properly appealed and has therefore become final pursuant to Section 410.169.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge